ERRATA

Page 2,	line 4.	"F. Supp. III" should read "F. Supp. 111"
Page 3,	line 17.	"Littletown" should read "Littlestown"
	line 37.	"F.2d Supp. 64," should read "F.2d 64,"
	line 44.	"Eo. 478," should read "Eq. 487,"
Page 4,	lines 56.	"Samms v. Chicago Title & Trust Co., 111 N.E. 2d 172 (349 Ill. App. 413, 1953)" should read "Samms v. Chicago Title & Trust Co., 349 Ill. App. 413, 111 N.E. 2d 172 (1953)."
	line 39.	"F.2d. Supp. 304," should read "F.2d. 304,"
Page 6,	line 7.	"Construction 1914-" should read "Construction 914-"
Page T3,	line 23.	"3670 an 3671," should read "3670 and 3671,"
Page T4,	line 32.	"Section 1853, 758" should read "Sections 1853, 758"
Page T6,	line 10.	"ineluctable correct" should read "ineluctably correct"
Page T9,	line 26.	"Government' argument" should read "Government's argument"
	line 28.	"Governments reliance" should read "Government's reliance"
Page T10,	line 7.	"liens and; (3)" should read "liens; and (3)"
	line 8.	"of immediate in-" should read "of immediate en-"
	line 30.	"prevsion" should read "provision"
	line 33.	"unpaid taxs" should read "unpaid taxes"
Page T11,	line 23.	"misapprehenson" should read "misapprehension"
Page T12,	line 6.	"So far as" should read "So far as other"
	line 7.	"lins" should read "liens"
Page T13,	line 18.	"saving of he" should read "saving of the"
	line 20.	"jurgment" should read "judgment"
Page T14,	line 12.	"discuseed." should read "discussed."
Page N1,	line 1.	"Osborn," should read "Osborne,"
Page N7,	line 35.	"at the tme" should read "at the time"

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 92

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF NEW BRITAIN, CONNECTICUT, ET AL,
RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

SUPPLEMENTAL BRIEF FOR RESPONDENT

GRANT OF PERMISSION TO FILE

This supplemental Brief for the Respondent is submitted pursuant to permission granted by the Court at the close of the argument heard in this case on December 1, 1953.

QUESTION PRESENTED

The question here is whether the Supreme Court of Errors of Connecticut committed reversible error in affirming a judgment directing distribution of the proceeds of a mortgage foreclosure sale of Connecticut real estate.

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The judgment provided for distribution in the following order: expense claimants; the City of New Britain as lienor for real estate taxes and water charges; L. Brown as holder of first and second mortgages, including certain costs taxed in his favor; W. G. Dunn as judgment lienor; and the United States as lienor for withholding and federal unemployment taxes and federal insurance contributions (R. 10-11). Although the present controversy is by stipulation (R. 12) solely between the City of New Britain and the United States as to their relative priority, the mortgages and judgment lien are not stipulated out of the case. In particular it is pointed out that the controversy does *not* concern merely the relative superiority of the federal and the municipal tax liens in a surplus remaining after satisfaction of the mortgages and other prior claims, as is suggested in the Government Brief at pp. 2 and 4 n. 1.

SUMMARY OF ARGUMENT

I

The Government's first argument is that although the municipal liens on the Connecticut realty here involved are superior by Connecticut law to encumbrances which are by federal law superior to the Government's tax liens, the municipal liens are not thereby superior to the federal tax liens. Yet neither logic nor authority is shown to require or, indeed, to permit any different result. Even if *arguendo* it should be conceded that the federal liens would supercede the City's liens in a contest not involving encumbrances prior to the federal liens, the presence of such encumbrances here creates a logically insoluble circuity of priority on the assumptions made by the Goverment. The resolution of the problem by the Connecticut courts is presumptively correct and cannot be overturned on a suggestion of the existence of possible alternatives which generate incongruities of their own.

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II

The government concedes the validity and priority of of the mortgages foreclosed below. Under the law of Connecticut, and generally, mortgages on realty are subject to liens securing local taxes on the realty. Mortgagees can ordinarily protect their security by paying such taxes and adding the amounts paid to their mortgages. In enacting in 1913 the notice-filing provision now found in Section 3672(a) of the Internal Revenue Code, which protects mortgages as against unfiled federal tax liens, Congress cannot be deemed either to have been unaware of the superiority generally conferred on local real estate tax liens over mortgages or to have intended to create a circuity of priority involving these three classes of liens. The only reasonable interpretation of Section 3672, therefore, is that Congress intended invalidation of the unfiled federal lien as against not only mortgagees and others named therein but also local governmental units holding paramount tax liens according to normally prevailing rules of relative priority.

III

Although the court below relied on what it regarded as the reasonable interpretation of Section 3672(a) of the Internal Revenue Code rather than on the rule of "first in time, first in right," which it thought applicable under Sections 3670 an 3671, the Government challenges the discussion of the latter rule as a holding contrary to its position that the federal tax lien is always paramount under these sections. Section 3672 is viewed in its Brief as a statute creating exceptions to that paramountcy rather than as a notice-filing statute designed to protect *subsequent* purchasers and certain *subsequent* encumbrances against the harsh consequences of enforcing the secret federal tax lien. Finally, the Government urges that the City's liens were not perfected so as to

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prevail over the federal tax liens under the rules developed in the cases construing Revised Statutes Section 3466, conferring priority on the United States in certain liquidations of insolvent estates. The repositories of evidence of legislative intent in the enactment and amendment of Sections 3670-3672 of the Internal Revenue Code are not only devoid of any suggestion that the general tax lien is to have any special priority or that the policy embodied in the federal priority statute (Rev. Stat. Section 3466) has any revelance for the general lien statute; they contain convincing proof that the Government's position thereunder is intended to be assimilated to that of the ordinary private lienor.

ARGUMENT

I

Even if the federal liens were superior to the municipal liens in a hypothetical situation not involving a mortgage and judgment lien, the disposition of the proceeds by the Connecticut courts in this case reaches the most reasonable resolution of a logically insoluble problem.

The real property subject to the liens involved in this case was sold to the foreclosing mortgagee for $27,500. Net rental receipts augmented the proceeds to slightly more than $28,000. The dispute here concerns the rival claims to the balance of roughly $26,000 remaining after defrayal of sale expenses. It will simplify the presentation and, it is believed, entail no distortion to use round numbers and to assign letter symbols to the different liens involved.

The Connecticut courts made the first allocation out of the balance to the City of New Britain in payment of its liens securing taxes and water charges amounting to $4,000 pursuant to Conn. Gen. Stat. Section 1853, 758 (1949):

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d the letter *A* may be assigned to these liens. Next in e order of distribution came the two mortgages which were reclosed and thereafter a junior judgment lien, but for esent purposes they may be grouped together under the tter *B*, since there is no dispute about the order among ese three liens. These liens absorbed $17,000 of the bal- ce. Finally, the judgment under review ordered the pay- ent of any remainder to the United States on account of tax liens, and these may be grouped under the letter *C*. he $5,000 balance was insufficient to pay the Government's ,000 claim in full.

The government does not challenge the priority of *A* er *B*, and concedes the priority of *B* over *C* (Brief, pp. 4,). It contends nevertheless that *C* is paramount to *A*, and d indeed, on page 6 of its Brief, that logic is violated by acing *A* over *C*. Insofar as logic affords a guide to solu- on of the problem presented, the result reached below would em to be irrefutable.

The contention that *C* is prior to *A* is based on a phil- ophy or a prepossession that whatever is federal is neces- rily supreme, whether Congress wills it so or not. We gorously challenge the validity of that assumption in the gument made under II and III, *infra*. But even if the law ere otherwise and *C* could be said to be paramount to *A* if ly those two lienors were involved, we submit that the dgment of the Connecticut courts in this case would not in error.

The argument of the Government creates a circuity priority: *A* over *B*, *B* over *C*, *C* over *A*. Courts eschew ch situations as logical absurdities, and they do not arise the application of the usual rules governing the relative iority of liens. If a court is unable to escape a situation circuity of priority, it has of course a logically insoluble

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problem on its hands. The courts have wrestled with this kind of problem for two and one-half centuries, and legal scholars have vied with the courts in venturing solutions. Professor Osborne in his new *Handbook on Mortgages* discusses seven methods of disposition, none of which is free from criticism.[1] Logic fails because each claimant is entitled to the full extent of his lien as against an inferior lien, but can be required to yield to the full extent of a superior lien; yet every lien is superior and inferior at the same time.[2] In such a situation there can be no ineluctable correct result.[3]

In such a situation as that presented here the presumption in favor of the validity and correctness of the judgment of the highest court of a state comes here with special strength. While of course not binding on this Court, a state court's determination in a case involving an asserted conflict between a state tax statute and a federal constitutional or statutory provision will be accorded great respect and sustained if "no real oppression or manifest wrong" results. *Atlantic Coast Line R. R. v. Phillips*, 332 U. S. 168 (1947).

The judgment now before the Court is the judgment of a unanimous court of last resort of the State of Connecticut affirming a state superior court, there being full argument of the question and full consideration of the contentions here presented, in both courts below. The Government has failed to discharge the burden resting on it in seeking the overturn of the Connecticut courts' judgment.

II

In invalidating the federal tax lien as against mortgagees and judgment creditors Congress must be taken to have intended invalidation of the federal lien as against local real property tax liens which are normally prior to mortgages and judgment creditors' liens.

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The local real estate tax was in 1913, when Section 3672 was enacted in its original form, and is still in 1953 the basic source of revenue by which local communities are enabled to provide the elementary governmental services of fire and police protection, maintenance of schools, streets, and sewers, etc.[4] As intimated in the Government's Brief at page 23, this kind of tax is generally secured in this country by a lien which is accorded priority over all other encumbrances, without reference to the time the latter arise.[5]

Laymen are hardly less aware than lawyers of the prime nature of the real estate tax lien and its crucial importance in real estate transactions. The members of the Congress that enacted the original notice-filing provision in 1913[6], now Section 3672(a) of the Internal Revenue Code, cannot be deemed to have legislated in ignorance of what has been common knowledge among men of affairs in this country for a hundred years. It would be even more incredible to suppose that Congress, familiar with the general superiority of local real estate tax liens over mortgages and other encumbrances, would invalidate the unfiled federal tax lien as against mortgagees and judgment creditors and yet intend to confer superiority for the federal lien as against the local tax lien. To impute to Congress an intent to create situations of circular or triangular priority surely does violence to the canon that a construction will be avoided which leads to an absurdity or imputes total ignorance to the legislature when an application having no such consequences is possible.[7] As the court below concluded, it is not merely a permissible but "The only reasonable interpretation of Section 3672 . . . that the Congress, in enacting it, expressed the intention that Federal liens should be subordinated to such mortgages and judgment liens as are described therein and, consequently, subordinated to such other incumbrances as have priority

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over those mortgages and judgment liens." 139 Conn. at 373 94 A.2d at 15 (R.22).

Precisely the same conclusion was reached by Chancellor Walcott in *Ferris v. Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 Atl. 577 (1924), a case on all fours with the present case.[8] In addition to this precedent, the only case in point cited in the Government's Brief, the result below is supported by the several authorities cited in the footnote appended hereto.[9] If logic falls short of sustaining the Government's first argument, its appeal to authority (in its Brief at pp. 6 and 12) is no better founded.[10]

But it is said at page 15 of the Government's Brief that if a municipal tax lien may prevail over a federal tax lien, a state is free to subordinate the federal lien to every manner of state lien, thus defeating the uniformity which is the cardinal principle of federal tax legislation. Now uniformity is not the legal equivalent of supremacy. Moreover, the principle of uniformity, whatever its strength, is one of construction and cannot override other manifestations of Congressioal intent, even though the federal treasury may net less from lien foreclosure proceedings. In five of the nine amendments of the general tax lien statutes which have brought Sections 3670-3672 to their present form[11] Congress has concerned itself with making the statute operate more equitably in respect to third parties rather than more uniformly and effectively as a means of insuring collection of taxes due the United States. The same policy is found in what Congress has done in Sections 64a and 67c of the Bankruptcy Act whereby the relative status of federal tax claims and federal tax liens in bankruptcy proceedings has waned over the course of the last half century.[12]

The court's ruling below, however, that Congress must have intended the invalidation of the unfiled federal tax lien

against not only mortgages and judgment liens but also local encumbrances paramount to such mortgages and judgments, involves no violation of the principle of uniformity. As pointed out above (see note 9 and the accompanying text), other courts are in general accord with the ruling. And, indeed, the Government is constrained to concede that where a mortgagee may under state law pay municipal taxes and charges and add the amount to the secured indebtedness, the amount so paid is secured by a lien of the same stature as the mortgage *vis-a-vis* the federal tax lien.[13] If Congress should become persuaded that states are about to engage in widespread subordination of mortgages and judgment liens to other liens in order to defeat the tax lien of the United States, and that national tax collection may be jeopardized hereby, then Congress may appropriately legislate against the danger.

III

In any event, the municipal liens which arose before the federal liens are prior in right because prior in time.

A. Congress intended the rule of "first in time, first in right" to apply under the federal general tax lien statute.

While the decision below did not rest on the rule that "first in time is first in right" and has been shown to be correct without reference to that rule, convincing evidence that Congress intended the rule to govern in the application of the original general tax lien statute negates the Government' argument for an absolute priority over liens not named in Section 3672.

The Governments reliance is placed on *United States v. Security Trust & Savings Bank*, 340 U. S. 47 (1950), sustaining the priority in right of a federal tax lien which arose after an attachment lien had become effective under Califor-

nia law. The *Security Bank* case is distinguishable from that presented here in that (1) it did not involve three or more liens some of which were concededly prior to the federal tax lien; (2) the attachment lien there involved possessed none of the characteristics of the City's real estate tax lien which enable it to supersede other encumbrances, including both prior and subsequent mortgages and judgment liens and; (3) the attachment lien had not reached the stage of immediate inforcibility that characterizes the City's tax liens in this case.[14] Insofar, however, as the United States relies on *Security Bank* for asserting a rule of absolute paramountcy for the general federal tax lien over all liens not literally excepted by Section 3672[15], its Brief ignores cogent evidence of Congressional intent to the contrary.[16]

Graphic proof of the Congressional intent with respect to the relative priority of the lien created by Section 3670 is found in the contrast between the language it has used in the general tax lien statute and that found in the contemporaneously created lien for taxes on distilled spirits.[17] Congress became concerned, however, lest the purpose of collecting the tax on distilled spirits should be defeated by prior liens, and so it provided explicitly for a *first lien* in legislation that survives today in Section 2800e (1) of the Internal Revenue Code.[18] But Congress was so solicitous of the rights of prior lienors that it insisted on obtaining waivers of their priority before a distiller could obtain a performance bond, a condition precedent to legal entry into the distilling business.[19] This waiver is still provided for in Section 2815 (b)(1)(B) of the Internal Revenue Code. If the Government's second argument here were sound, such an elaborate provsion would be superfluous. In *Blacklock v. United States*, 208 U. S. 75 (1908), where it became revelant to determine the relative priority of a federal tax lien securing unpaid taxs on distilled spirits as against property for which no waiver had been ex-

ecuted, the Court ruled in favor of the Government solely and explicity on the grounds that the Government's lien was first in time. *Id.* at 89. See also *Mansfield v. Excelsior Refining Co.*, 135 U. S. 326, 339 (1890).

The suggestion in the Government's Brief (at p. 13) that "Stronger language could hardly have been selected to reveal" a purpose to confer paramountcy on the general lien over state-created liens is belied by the ease with which Congress selected the expression "first lien" when that fitted its purpose. The contemporaneity of the origin of the general and special tax lien statutes and of amendatory legislation[20] precludes the suggestion that Congress did not deliberately refrain from conferring the same status on the general tax lien as it did on the distilling tax lien.

The Government purports to find in the notice-filing provision added in 1913 a purpose to confer paramountcy on the federal tax lien as against all liens not specifically named therein without reference to the chronology of their attachment. Since the City of New Britain is not explicitly comprehended within the list of beneficiaries of that amendment, it is argued that it cannot prevail over the federal tax lien even though prior in time. This reading of the notice-filing provision discloses a misapprehenson of its purpose and effect. The specific purpose of the amendment of 1913 was to overrule *United States v. Snyder*, 149 U. S. 210 (1893), which had enforced the federal tax lien as against a *subsequent* bona fide purchaser of realty. Likewise the purpose of the amendment of 1939, as pointed out in Mr. Justice Jackson's opinion in *Security Bank*, 340 U. S. at 53, was to overrule *United States v. Rosenfield*, 26 F. Supp. 433 E. D. Mich. (1938), which enforced the federal lien as against a *subsequent* purchaser of securities. These cases were no more than applications of the "first in time, first in right" rule.

Congress acted to relieve against the resulting harshness by protecting purchasers and certain encumbrancers as against even a *prior* federal tax lien of which they had no notice. The rule of "first in time, first in right" still prevails, but as to three classes of lienors, the Federal Government's lien is postponed in effectiveness until notice-filed. So far as lins are concerned, the law of 1913 makes no change: The rule is still "first in time, first in right" as four dozen cases attest.[21]

B. Congress did not intend to enact the doctrine of the inchoate and general lien.

Although the Government acknowledges that the distribution of the proceeds in the foreclosure action below is not governed by the federal priority statute (Rev. Stat. Section 3466, (1875), it invokes precedents decided under that statute in support of its contention that the City's tax liens here were not perfected before the federal liens arose (Government's Brief, pp. 25-28.) In view of the specific nature of the City's tax and of the liens securing it, as contrasted against the general tax lien of the Government, its counsel could not with good grace challenge the specificity of the municipal liens. Moreover, the liens were "perfected" against every interest and in every sense in which the term is used outside the esoteric world that has enveloped Section 3466 of the Revised Statutes since 1929.[22]

Whatever may be said as to the process by which the doctrine of the inchoate and general lien has been engrafted onto the federal priority statute[23], there is no justification whatever for reading the doctrine into the federal tax lien legislation. The suggestion in the Government's Brief (pp. 25 *et seq.*) that the two statutes should be assimilated ignores the fact that nowhere in legislative records and reports that throw light on the purpose and meaning of the federal tax

lien statute and its nine amendments is there the breath of a suggestion that the federal priority statute bears any relation or, indeed, even exists[24]. In bankruptcy legislation, this Court has always recognized that Congress has exercised care in distinguishing between priorities and statutory liens for taxes[25]. If the federal priority and tax lien statutes are now to be amalgamated, there should be, if not an affirmative showing that the Congressional purpose is being effectuated, at least a demonstration that the result is not inconsistent with that purpose.

Irrefutable proof that Congress intended no enactment of the rule disentitling inchoate and general liens from ranking in the order of their creation under Sections 3670-3672 is provided by the House Report accompanying the bill that became the 1913 amendment. One of the Government's examples of an inchoate and general lien is a judgment lien (see its Petition for Certiorari at p. 14, n. 5). The implication is then that were it not for the express saving of he judgment creditor in the notice-filing statute, the federal tax lien would prevail over a prior jurgment lien. The House Report, however, discusses the plight of judgment creditors, along with purchasers and mortgagees, who could not under the law as then written protect themselves against prior secret tax liens without consulting every collector in the country[26]. If the law were as the Government contends, it would not have done the judgment creditor any good to consult all the collectors in the country, because a later federal tax lien would override his judgment equally with a prior one.

The contention of the Government in this case that the federal tax lien under Sections 3670-72 must be accorded paramountcy by virtue of its assimilation with the federal priority under Revised Statutes Section 3466 is wholly con-

tradicted by this plain, unambiguous statement in the House Report accompanying the 1913 amendment: "There is no reason why the government should not occupy the same position with reference to liens on property as does the individual[27]." The statement embodies the philosophy written into Section 3670 and all its amendments. The Government has cited, and it is believed can cite, no evidence of a contrary legislative intent. Insofar as the *Security Bank* case may be thought to be based on a contrary view of the tax lien statute, it is pointed out that the Government's unopposed Brief in that case did not call the attention of the Court to the evidences of legislative intent herein discuseed. Nor was the impressive array of authority treating the federal tax lien like an ordinary private lien discussed in that Brief.

The centripetal force that has influenced so much political thought in the last quarter century should not be permitted to control the construction of a statute enacted and amended with completely different presuppositions in the legislative mind. It may be that the federal tax lien *should* prevail over all inchoate and general liens if the collection of taxes due the United States from tax delinquents is to be adequately fulfilled. But Congress has not said so. Congress is subject to no constitutional compulsion to enact tax collection legislation with a single eye to its effectiveness in increasing the revenue. Notwithstanding the magnitude and supremacy of its power to tax, Congress is under no duty to override municipalities throughout the country in their concurrent efforts to collect revenue from real estate. On the contrary, Congress is constitutionally free to enact tax collection legislation which operates equitably as against third persons, including municipalities. It is constitutionally free to use its acknowledged powers in such a way that local governments can remain strong and continue to provide the

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basic services for which the American people still look to such governments.

CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of Errors of the State of Connecticut should not be disturbed.

Respectfully submitted,

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FOOTNOTES

[1] *Osborn, Mortgages* §209 (1951). See also 4 *American Law of Property* §17.33 (1952).

[2] The Government suggests at pp. 7 and 17 of its Brief that there is another way out of the circuity created by its assumption in respect to the superiority of the federal tax lien. This solution would set aside enough to pay *B*, *i.e.*, the mortgage liens and the judgment before satisfying the Government. *A*, *i.e.*, New Britain, would be satisfied from the sum set apart. The suggestion appears to accord rather cavalier treatment to the interests of the mortgagee and the judgment creditor in the light of the protestations on pages 2 and 4 of the Government's Brief that the controversy here relates only to the relative priority of the City and the United States in a surplus remaining "after satisfaction of the mortgages and other prior claims." But it is to be kept in mind that while the bid here was $27,500, with $500 coming in from rent, actually the mortgagee who purchased the property applied his $15,000 debt to the bid. There was thus only $13,000 cash involved. $2,000 went to administrative expenses. $4,000 applied to the City's tax liens would leave $7,000. Surely the judgment lienor is then entitled to his $2,000 before any payment to the United States, whose lien is explicitly made invalid as against the judgment creditor by Section 3672. That leaves only $5,000 for the United States, *i.e.*, what it got under the lower courts' judgment.

The Government's method of solution can be applied with equal propriety in this wise: Start with the Federal Government, setting a part sufficient out of the $26,000 to pay its $8,000. Next would come the City of New Britain with its $4,000 of course, and then the mortgagee and judgment creditor. But the mortgagee and judgment creditor, being prior to the Federal Government, would be entitled to payment out of the sum of $8,000 so set apart. The ultimate result of this application would be the same as that reached by the judgment below. The logic that justifies forcing *B* to absorb *A*'s priority to protect *C* against indirect attack furnishes just as strong support for compelling *C* to absorb the priority of *B* in order to protect *A* against *B*. *Cf. Campbell, Protection Against Indirect Attack* in *Harvard Legal Essays* 3, 17-18 (1934).

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[3] Perhaps the closest approximation to a scientific solution to the problem is that advanced in a Note in 38 *Col. L. Rev.* 1267 (1938), proposing that the method of distribution seek to approach the reasonable expectation of each claimant as a junior lienholder. The equity of the lienholder subsequent to the smallest of the competing liens would thus be the strongest, and the lienholder who is subsequent to the largest lien would have the weakest position. That would be the Government here since it concedes priority to *B*, representing $17,000 in liens. As Professor Osborne points out, however, this method of solution has the disadvantage of considerable complexity (*Handbook on Mortgages* 538-9). So far as can be discovered, it has never been employed in a reported case.

[4] *Hellerstein, State and Local Taxation* 9, 643-7 (1952); *Seligman, Essays in Taxation* 345 (10th ed. 1925).

[5] *See Baltimore Shipbldg. Co. v. Baltimore*, 195 U. S. 375, 381 (1904) (per Mr. Justice Holmes); 4 *American Law of Property* 242 (1952); 51 *Am. Jur.*, Taxation 1016 (1944).

[6] 37 Stat. 1016.

[7] 2 *Lewis' Sutherland, Statutory Construction* 914-15 (1904).

[8] If this case is to be limited to its peculiar facts, as the Government suggests in its Brief at p. 12 n. 4, here are the peculiar facts again. But the Government suggests that *Ferris* has been limited and in effect discarded by the court which rendered it in In re *Mitchell's Restaurant, Inc.*, 31 Del. Ch. 121, 67 A.2d 64 (1949). This disparagement is made in spite of the fact that the court said explicitly and correctly in *Mitchell* that *Ferris* was not in point. 31 Del. Ch. at 128, 67 A.2d at 68. *Mitchell* involved unpaid state unemployment compensation contributions which were not even regarded as liens under the applicable state statute (Del. Laws 1941, c.280, §14(g)). Moreover, that statute explicitly preserved priority of federal taxes.

[9] *United States v. Sampsell*, 153 F.2d 731 (9th Cir. 1946) (involving a state corporate franchise tax, a mortgage, and a federal tax lien in bankruptcy; chronological order observed); *Levy v. Tubby's Wine & Liquor Shop, Inc.*, 110 N. Y. S. 2d 653

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(N. Y. City Ct. 1951) (state and city tax liens, judgment creditor's lien, and federal tax lien), *rev'd on another ground*, 116 N. Y. S. 2d 207 (1st Dep't 1952); *State v. Wynne*, 134 Tex. 455, 133 S. W. 2d 951 (1939) (state tax lien, mortgage, and a federal lien and priority in receivership proceeding). Moreover, the reasoning in *Board of Supervisors v. Hart*, 210 La. 78, 94, 26 So. 2d 361, 366 (1946), In re *Taylorcraft Aviation Corp.*, 76 F. Supp. 81, 85 (N. D. Ohio 1947), *aff'd*, 168 F. 2d 808 (6th Cir. 1948), and In re *Caswell Construction Co.*, 13 F. 2d 667, 672 (N. D. N. Y. 1926), supports the result below.

If we should bring in Rev. Stat. §3466 cases, as the Government has (see note 10, *infra*), we may cite in support of the result below the decisions in *United States v. Guaranty Trust Co.*, 33 F. 2d 533, 537 (8th Cir. 1929), *aff'd on alternative ground*, 280 U. S. 478 (1929); and *Wilcocks v. Waln*, 10 S. & R. 380 (Pa. 1824).

[10] Note 4 on p. 12 of the Government's Brief cites three cases as directly *contra* to the decision below. The first is a decision of an intermediate Illinois court, two judges participating, involving a mechanic's lien subsequent in time to the federal tax lien. The *Samms* case avowedly follows *Republic Nat. Life Ins. Co. v. Hedstrom*, 346 Ill. App. 555, 105 N. E. 2d 782 (1952), "which arose on a state of facts almost identical" and which contains an excellent refutation of the Government's second argument, *i.e.*, as to the applicability of the "first in time, first in right" rule to the federal tax lien. The second footnote authority is a memorandum opinion of a West Virginia circuit court, which involved Rev. Stat. §3466 rather than the federal lien statute involved here. The third case is an unreported opinion of a federal district court, which can not be scrutinized. This array of authority hardly settles anything against the decision below, even if it stood alone.

[11] 20 Stat. 331 (1879), eliminating relation back of lien to date tax became due; 37 Stat. 1017 (1913), postponing validity of lien to notice-filing with respect to purchasers, mortgagees, and judgment creditors; 43 Stat. 994 (1925), providing for notice-filing in records of towns and cities in New England; 45 Stat. 875 (1928), placing limitation on duration of tax lien; 53 Stat. 882 (1939), adding pledgees to list of beneficiaries of notice-filing

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and protecting purchasers, pledgees, or mortgagees of securities against any federal lien of which they have no notice or knowledge. The four amendments effected by 48 Stat. 757 (1934), 49 Stat. 1921 (1936), 53 Stat. 448 (1939), and 56 Stat. 957 (1942), have involved formal or procedural changes.

[12] See *Wurzel, Taxation During Bankruptcy Liquidation*, 55 *Harv. L. Rev.* 1141, 1145-6 (1942); Note, 56 *Yale L. J.* 1258, 1263 (1947); *cf. Davis v. Pringle*, 268 U. S. 315, 318 (1925); *Mellon v. Michigan Trust Co.*, 271 U. S. 236, 240 (1926).

[13] See *Sherwood v. United States*, 5 F. 2d 991 (E. D. N. Y. 1925); *Kohlmeier, Federal Tax Liens Under Rev. Stat. Sec. 3186*, 13 *Tax Mag.* 191, 196 (1935); *cf. United States v. Sampsell*, 153 F. 2d 731, 736-7 (9th Cir. 1946).

[14] Municipal tax liens on realty may under Connecticut law be enforced by levy and sale. Conn. Gen. Stat. §1853 (1949).

[15] No reported case decided since *Security Bank* has been found which gives effect to the Government's view of its holding. In the following *post-Security Bank* cases nonfederal liens were sustained as against the federal tax lien although not excepted by Section 3672: *United States v. Albert Holman Lumber Co.*, 206 F. 2d 685 (5th Cir. 1953) (materialman's lien); In re *Ann Arbor Brewing Co.*, 110 F. Supp. 111 (E. D. Mich. 1951) (local and state tax liens); *United States v. Acri*, 109 F. Supp. 243 (N. D. Ohio 1952) (attachment lien); *Sunnyland Wholesale Furn. Co. v. Liverpool & L. & G. Ins. Co.*, 107 F. Supp. 405 (N. D. Tex. 1952) (garnishment lien), *Fidelity & Deposit Co. v. Lovell*, 108 F. Supp. 360, 368 (S. D. Miss. 1952) (lien of creditor's bill attacking fraudulent conveyance); *United States v. Canadian American Co.*, 108 F. Supp. 206, 207 (E. D. N. Y. 1952) (county real estate tax lien); *Gulf Coast Marine Ways, Inc. v. The J. R. Hardee*, 107 F. Supp. 379, 385 (S. D. Tex. 1952) (preferred maritime liens); *United States v. Griffin-Moore Lbr. Co., Inc.*, 62 So. 2d 589 (Fla. 1953) (mechanic's lien); *Levy v. Tubby's Wine & Liquor Shop, Inc.*, 110 N. Y. S. 2d 653 (N. Y. City Ct. 1951), *rev'd on another ground*, 116 N. Y. S. 2d 207 (1st Dep't 1952) (city and state tax liens). *Cf. Hawkins v Savage*, 110 F. Supp. 615 (D. Alaska 1953) (attaching creditor regarded as a bona fide purchaser under Congressional legislation); *Exeter Banking Co. v. Sleeper*, 97

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N. H. 321, 87 A.2d 151 (N. H. 1952) (sustaining equitable interest as a mortgage enforceable against the United States as a rival lienor).

[16] Insofar as the literal language of Sections 3670-3672 controls, a reading which recognizes the validity of preexisting liens gives full and precise effect to the words used. The cases of divided ownership contemplated by the reference to "rights to property" in §3670 include property held subject to encumbrances. See, *e.g., United States Fid. & Guar. Co. v. United States,* 201 F. 2d 118 (10th Cir. 1952) (involving lien of surety on subcontractor's performance bond against fund payable to subcontractor); *Karno-Smith Co. v. Maloney* 112 F. 2d 690 (3d Cir. 1940) (" . . . the rights of the collector rise no higher than those of the taxpayer whose right to property is sought to be levied on").

[17] The general tax lien statute appeared first in 13 Stat. 470-1 (1865) and became Rev. Stat. §3186 (1875). The lien for duties on distilled spirits was originally provided in 13 Stat. 243 (1864) and extended in 13 Stat. 471-2 (1865). This special tax lien statute became Rev. Stat. §3251 (1875).

[18] 15 Stat. 125 (1868).

[19] 15 Stat. 128 (1868), which became Rev. Stat. §3262 (1875).

[20] In addition to the statutory references in notes 16-18, *supra,* it may be noted that the general tax lien statute was perfected in 14 Stat. 107 (1866), while the special distilling tax lien statute received legislative attention in 14 Stat. 157 (1866), and 14 Stat. 480 (1867). The general tax lien statute was amended by 20 Stat. 331 (1879) to prevent relation back of the lien.

[21] In addition to the cases cited in note 15, *supra,* may be added the following holdings, which deny paramountcy to the federal tax lien as against rival liens although the latter did not fall within the "specific, sparing, *ad hoc*" exceptions prescribed in §3672(a): *Adams v. O'Malley,* 182 F. 2d 925 (8th Cir. 1950) (county tax liens); In re *Taylorcraft Aviation Corp.,* 168 F. 2d 808 (6th Cir. 1948) (mechanic's lien); *United States v. Winnett,* 165 F. 2d 149 (9th Cir. 1947) (contingent right of setoff);

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United States v. Sampsell, 153 F. 2d 731 (9th Cir. 1946) (corporate franchise tax lien); *American Surety Co. v. City of Louisville Mun. Housing Comm'n*, 63 *F. Supp.* 486, 487 (W. D. Ky. 1945), *aff'd sub nom. Glenn v. American Surety Co.*, 160 F. 2d 977, 982 (6th Cir. 1947) (equitable lien of surety making good under performance bond, against unpaid balance in hands of obligee, for amount of expenditure plus interest); *United States v. Bank of Shelby*, 68 F. 2d 538 (5th Cir. 1934) (banker's equitable lien or right of setoff); In re *Fisher Plastics Corp.*, 89 F. Supp. 446 (D. Mass. 1950) (lien of trustee in bankruptcy); *United States v.* 52.11 *Acres of Land*, 73 F. Supp. 820 (E. D. Mo. 1947) (garnishment lien); *United States v. O'Dell*, 61 F. Supp. 966, 968 (E. D. Mich. 1945), *aff'd on other grounds*, 160 F. 2d 304, 306-7 (6th Cir. 1947) (city, county, and state tax liens); *New York Casualty Co. v. Zwerner*, 58 F. Supp. 473 (N. D. Ill. 1944) (equitable lien of surety on performance bond against funds due principal on construction contract); In re *Van Winkle*, 49 F. Supp. 711 (W. D. Ky. 1943) (equitable lien of surety on bond against retained percentage in hands of party in whose favor the bond ran); *Equitable Life Assur. Soc'y v. Moore*, 29 F. Supp. 179 (E. D. Ill. 1939) (assignment of shares of stock to secure loan); *Exchange Nat. Bank of Tulsa v. Davy*, 13 F. Supp. 226 (N. D. Okla. 1936) (assignment creating lien on equitable estate); In re *Mt. Jessup Coal Co., Ltd.*, 7 F. Supp. 603, 606 (M. D. Pa. 1934) (borough tax lien, ruling against United States having alternative basis, however); *Winston-Salem v. Powell Paving Co.*, 7 F. Supp. 424 (M. D. N. C. 1934) (involving street assessment, municipal and county ad valorem property tax, and state income tax liens); In re *Holmes Mfg. Co.*, 19 F. 2d 239 (D. Conn. 1927) (liens of receiver's certificates). In re *Caswell Construction Co.*, 13 F. 2d 667 (N. D. N. Y. 1926) (mechanic's liens); *The River Queen*, 8 F. 2d 426 (E. D. Va. 1925) (maritime liens for seamen and materialmen); In re *Wyley Co.*, 292 Fed. 900 (N. D. Ga. 1923) (involving state taxes); *Muhleman & Kayhoe, Inc. v. Brown*, 43 Del. 207, 45 A. 2d 521 (Super.Ct. 1945) (equitable pledge); *Ferris v. Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 Atl. 577 (1924) (involving state, county, and city tax and sewer liens); *Schmitz v. Stockman*, 151 Kan. 891, 101 P. 2d 962 (1940) (Statutory lien of landlord); *Board of Sup'rs v. Hart*, 210 La. 78, 26

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So. 2d 361 (1946) (lien and privilege of atachment); *Regan v. Metropolitan Haulage Co., Inc.*, 127 N. J. Eq. 487, 14 A. 2d 257 (Ch. 1940) (garage keeper's lien); *Cranford Co., Inc., v. L. Leopold & Co., Inc.*, 189 Misc. 368, 70 N. Y. S. 2d 183 (Sup. Ct. 1947), *aff'd*, 273 App. Div. 754, 75 N. Y. S. 2d 512 (1st Dep't 1947), *aff'd*, 298 N. Y. 670, 82 N. E. 2d 580 (1948) (mechanic's lien); *Knight v. Knight*, 272 App. Div. 499, 71 N. Y. S. 2d 357 (1st Dep't 1947), *aff'd*, 297 N. Y. 945, 80 N. E. 2d 344 (1948) (assignment of percentage of wages); *United States F. & G. Co. v. Triborough Bridge Auth.*, 297 N. Y. 31, 74 N. E. 2d 226 (1947) (equitable lien of surety on performance bond against money due contractor in default); *First Nat. Bank v. Southland Production Co.*, 189 Okla. 9, 17-18, 112 P. 2d 1087, 1095-6 (1941) (state tax lien securing unascertained amount); *United States v. Yates*, 204 S. W. 2d 399, 405 (Tex. Civ. App. 1947) (attachment lien and liens for material, equipment, and labor furnished public contractor, "perfected" by filing notice with office of public agency involved); *State v. Wynne*, 334 Tex. 455, 133 S. W. 2d 951 (Tex. 1939) (state tax liens).

In the following cases the federal tax lien prevailed over a nonfederal lien because the federal lien was prior in time: *Cobb v. United States*, 172 F. 2d 277, 278-9 (D. C. Cir. 1949); In re *Northwest Wood Products Co.*, 168 F. 2d 639 (7th Cir. 1948); *United States v. Greenville*, 118 F. 2d 963, 966 (4th Cir. 1941) (per C. J. Parker); In re *F. MacKinnon Mfg. Co.*, 24 F. 2d 156 (7th Cir. 1928); *United States v. Certain Lands*, 71 F. Supp. 76 (E. D. Mo. 1946); *United States v. Record Pub. Co.*, 60 F. Supp. 194 (N. D. Cal 1945); *Gerson, Beesley & Hampton, Inc., v. Shubert Theatre Corp.*, 7 F. Supp. 399, 400 (S. D. N. Y. 1934); *Republic Nat. Life Ins. Co. v. Hedstrom*, 346 Ill. App. 555, 105 N. E. 2d 782 (1952); *Littlestown Nat. Bank v. Penn Tile Wks. Co.*, 352 Pa. 238, 42 A. 2d 606 (1945); *cf. United States v. The Pomare*, 92 F. Supp. 185, 188 (D. Hawaii 1950).

The rule of "first in time, first in right" has been applied with respect to the federal estate tax lien arising at the tme of the decedent's death (Int. Rev. Code §827(a). *Paul v. United States*, 127 F. 2d 64, 66 (6th Cir. 1942), *aff'd sub.nom. Det. Bk v. United States*, 317 U. S. 329, and *Michigan v. United States*, 317 U. S. 338 (1943); *United States v. Security-First Nat. Bank*, 30 F.

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Supp. 113 (S. D. Cal. 1939), *appeal dismissed*, 113 F. 2d 491 (9th Cir. 1940); In re *Decker's Estate*, 355 Pa. 331, 49 A. 2d 714 (1946), *cert. denied sub nom. Decker v. Kann*, 331 U. S. 807 (1947).

The rule of "first in time, first in right" is no more than an application of the first rule of property: *Qui prior est tempore potior est jure. Broom, Legal Maxims* 227 (10th ed., Kersley, 1939). The universality of the rule has often been recognized by this Court. *Rankin & Schatzell v. Scott*, 12 Wheat 177, 179 (U. S. 1827); *Howard v. Railway Co.*, 101 U. S. 837, 845 (1879).

[22] A state real property tax lien arising under a statute very much like Conn. Gen. Stat. §1853 (1949) was enforced against the United States in *United States v. Alabama*, 313 U. S. 274 (1941). The City's liens were "perfected" as against the United States for the purposes of §67b of the Bankruptcy Act. 4 *Collier Bankruptcy* pars. 67.24, 67.26 (14th ed. 1942). The Government's statement at pp. 26-7 of its Brief that the decision in *Merchant's Bank & T. Co. v. Pettison*, 112 Conn. 652, 153 Atl. 789 (1931), shows, "how far from 'perfected' the City's liens are" and that they must yield in precedence to the policy of another statute, misses completely what was there decided. The Connecticut statute involved in the case purposed to require exhaustion of his security by any judgment creditor holding a mortgage which was a "first charge." The judgment creditor-mortgagee in the case sought to avoid application of the statute by arguing that its mortgage was not a first charge in view of the priority of Hartford's tax lien. The court did not deny that the tax lien was first in precedence or was not perfected, but it did reject the mortgagee's construction which would have gelded the statute. The legislature obviously intended to deal with a mortgage that was a first mortgage, even though not prior to the city's tax lien.

[23] Compare, *e.g., Brent v. Bank of Washington*, 10 Pet. 596 (1836).

[24] See H. R. Rep. No. 1018, 62d Cong., 2d Sess. (1912); Sen. Rep. No. 1315, 62d Cong., 3d Sess. (1913); 49 Cong. Rec. 1802 (1913); H. R. Rep. No. 1273, 68th Cong., 2d Sess. (1925); H. R. Rep. No. 855, 75th Cong., 1st Sess. 25-6 (1939); Sen. Rep. No. 648, 76th Cong., 1st Sess. 10 (1939); 84th Cong. Rec. 7481-2

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(1939); H. R. Rep. No. 2333, 77th Cong., 2d Sess. 173 (1942); Sen. Rep. No. 1631, 77th Cong., 2d Sess. 248 (1942). See also Cong. Globe, 37th Cong., 2d Sess. 2254-58, 2351-8, 2454-5 (1862); 22 A. B. A. Rep. 53-8 (1899); 25 A. B. A. Rep. 496 (1902); 37 A. B. A. Rep. 41, 570 (1912); 38 A. B. A. Rep. 618 (1913).

[25] *City of Richmond v. Bird*, 249 U. S. 174 (1919); 3 *Collier Bankruptcy* par. 64.403 (14th ed. 1941).

[26] H. R. Rep. No. 1018, 62d Cong., 2d Sess. 1 (1912).

[27] H. R. Rep. No. 1018, 62d Cong., 2d Sess. 2 (1912).